IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE MOTION FOR DIRECTED VERDICT: CHARGE II, SPECIFICATIONS 4, 6, 8, 12 (18 U.S.C. §641 OFFENSES)**
v.	)	
	)	
MANNING, Bradley E., PFC U.S. Army, (b) (7)(C) Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, VA 22211	)	DATED: 4 July 2013

RELIEF SOUGHT

1. COMES NOW PFC Bradley E. Manning, by counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 917(a), requests this Court to enter a finding of not guilty for Specifications 4, 6, 8, and 12 of Charge II.

STANDARD

2. A motion for a finding of not guilty should be granted when, viewing the evidence in the light most favorable to the prosecution, there is an "absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged." R.C.M. 917(d).

ARGUMENT

3. In Specifications 4, 6, and 8 of Charge II, the Government has charged that PFC Manning stole or knowingly converted the Combined Information Data Network Exchange Iraq database containing more than 380,000 records; the Combined Information Data Network Exchange Afghanistan database containing more than 90,000 records; the United States Southern Command database containing more than 700 records. In Specification 12 of Charge II, the Government has charged that PFC Manning stole or knowingly converted the Department of State Net-Centric Diplomacy database containing more than 250,000 records.

A. The Government has Failed to Adduce Evidence that PFC Manning Stole or Converted the Databases in Question

4. In this case, the Government has not alleged that the property of which it has been deprived were *copies* of the SIGACTs, detainee assessment briefs, and diplomatic cables or the *information* contained within certain databases. Rather, the Government has charged that PFC

Manning stole or converted the actual *databases* themselves. *See* Charge Sheet. In Specification 4, 6 and 8 of Charge II, the Government alleges that PFC Manning stole or knowingly converted the Combined Information Data Network Exchange Iraq *database* containing more than 380,000 records; the Combined Information Data Network Exchange Afghanistan *database* containing more than 90,000 records; the United States Southern Command *database* containing more than 700 records. In Specification 12 of Charge II, the Government pleads that PFC Manning stole or knowingly converted the Department of State Net-Centric Diplomacy *database* containing more than 250,000 records. *Id.*

5. For instance, Specification 12 of Charge II reads as follows:

> In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 4 May 2010 , steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: *the Department of State Net-Centric Diplomacy database* containing more than 250,000 records belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

See Charge Sheet (emphasis added). The other specifications are identical in structure. The first part of the charge mirrors the language in 18 U.S.C. §641 ("Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, ... any record, voucher, money, or thing of value of the United States or of any department or agency thereof, ..."). The sentence immediately after the expression "to wit:" explains what is alleged to have been stolen or converted—a database. That the database in question contains more than 250,000 cables is descriptive and does not alter the fact that it is the database itself that PFC Manning is alleged to have stolen or converted. In other words, PFC Manning is not charged with stealing or converting more than 250,000 cables contained within the Net Centric Diplomacy database. PFC Manning is charged with stealing or converting the database itself, which happens to contain a certain number of cables. A "database" is not in any way synonymous with the information or records contained therein. A database is a receptacle for information, much like a filing cabinet is a receptacle for paperwork. *See, e.g.,* Stipulation of Expected Testimony of Mr. Bora (referring to CIDNE as "is a reporting and querying system"); Stipulation of Expected Testimony of Mr. Motes (noting that "[t]his database stored all detainee assessments").

6. Notably, the Government did not charge that PFC Manning stole or converted *information* or that he stole or converted a *copy of records* contained within the database. In other words, the Government could have charged that PFC Manning stole *information*.[1] *See e.g. United States v.*

[1] The Defense would maintain, however, that information is intangible property not properly within the ambit of §641. *See United States v. Truong Dinh Hung* 629 F.2d 908, 928 (4th Cir. 1980) ("In sum, because a criminal prohibition against the unauthorized disclosure of classified information would be inconsistent with the existing pattern of criminal statutes governing the disclosure of classified information and because Congress has always refused to enact a statute like s 641 applicable to the disclosure of classified information, I would hold that s 641 cannot be interpreted to punish the unauthorized disclosure of classified information. ... Whatever the content of "thing of value" in the context of other types of government information, this phrase may not be read to include

Jeter, 775 F2d 670, *680-1 (6th Cir. 1985) ("The government charged that Jeter 'did willfully and knowingly embezzle, steal, purloin and convert to his own use and the use of others, and without authority did sell, convey and dispose of records and things of value of the United States, the value of which is in excess of $100.00, to wit, carbon paper and *the information contained therein* relating to matters occurring on October 5, 1983, before a grand jury'"). Or, the Government could have charged that PFC Manning stole a copy of government records through the use of a CD, computer time, etc. and that such records are records of the United States government. *See e.g. United States v. Fowler*, 932 F.2d 306, 309-310 (4th Cir. 1991) ("Fowler was not charged with conveying abstract information. He was charged with conveying and converting documents, which, although copies, were things of value and tangible property of the United States. True, the documents contain information, but this fact does not deprive them of their qualities as tangible property and things of value."). *See also United States v. Hubbard*, 474 F. Supp. 64 (D.C.D.C. 1979) ("The government in response has attempted to predicate a violation of section 641 on two theories. The first is that the defendants stole the information in the documents, and the second is that the copies, allegedly made from government documents, by means of government resources, are records of the government, and thus the copies were stolen."; court ultimately did not permit government to proceed with theory that information was stolen as it held that information was not within the scope of 18 U.S.C. §641).

7. The Government in this case did not charge that PFC Manning stole or converted "information" or "copies"; instead it charged that he stole or converted "databases." Such a distinction is not, in any way, a semantic one: what PFC Manning is alleged to have stolen directly impacts not only the legal focus of the alleged theft or conversion (i.e. the *res* or property that was allegedly stolen), but also the valuation prong of 18 U.S.C. §641. That is, if PFC Manning is alleged to have stolen information, then the value of the information itself (and not the database) must be established. If PFC Manning is alleged to have stolen a copy of a government record, then the value of that copy must be established. Consequently, what PFC Manning is alleged to have stolen or converted is of crucial significance.

8. This proposition, while obvious, is illustrated in concrete terms using the case of *United States v. May*, 625 F.2d 186 (8th Cir. 1980). In *May*, the defendant, a former Adjutant General of the Iowa National Guard, was charged with several counts of converting *flight time* in government aircraft by directing unauthorized National Guard flights to destinations that allowed him to visit his fiancé. 625 F.2d at 188-89, 190-91. Notably, the government did not charge the defendant with converting the *entire airplane* to his own use as it was obvious that the he had not stolen or converted the airplane itself. Since the property alleged to have been converted for each count was flight time, *see id.* at 190-91, and not the entire aircraft used for that flight, the

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classified information within s 641."); *United States v. Tobias* 836 F.2d 449 (9th Cir. 1988) ("Our circuit has adopted an even broader limitation on the scope of section 641. In *Chappell v. United States*, 270 F.2d 274 (9th Cir.1959), we held, after an extensive discussion of the legislative history, that section 641 should not be read to apply to intangible goods. This interpretation has the advantage of avoiding the first amendment problems which might be caused by applying the terms of section 641 to intangible goods-like classified information. Thus, ... we ... construe section 641 as being generally inapplicable to classified information."). Since the Government has not alleged that PFC Manning stole or converted information, there is no need to brief this issue further. If this becomes a live issue, however, the Defense requests the opportunity to brief the question of whether information is properly within the scope of 18 U.S.C. §641.

Government sought to prove value by introducing the "cost per hour of operation for each airplane, which included the salaries of the pilots and the mechanics who serviced the planes." *Id.* at 191. The Government did not offer evidence of the cost of purchasing and the annual cost of maintaining the entire aircraft. Rather, the Government offered evidence to prove that the value of the intangible property converted exceeded the statutory amount, as section 641 requires. Thus, *May* illustrates that stealing "an airplane" and stealing "flight time" are two very different things. First, it is clear that the accused did not steal or convert the airplane since the airplane was still available for use to the United States government. Second, given that the government in that case charged that the accused converted flight time, it was the value of that specific flight time—and not the entire airplane—that was valued for the purposes of section 641. *See also United States v. Jordan*, 582 F.3d 1239 (11th Cir. 2009) (two defendants were charged with converting certain individuals' criminal records from within the National Crime Information Center database, rather than with a theft of the database itself; value adduced was value of the records, not the database itself).

9. If the Government in this case intended to charge theft of the *information* itself or theft of a *copy* of a record, instead of theft of the database, such a charge must appear in the Charge Sheet. *See e.g. United States v. Jeter,* 775 F2d 670, *680-1 (6th Cir. 1985) ("The government charged that Jeter 'did willfully and knowingly embezzle, steal, purloin and convert to his own use and the use of others, and without authority did sell, convey and dispose of records and things of value of the United States, the value of which is in excess of $100.00, to wit, *carbon paper and the information contained therein* relating to matters occurring on October 5, 1983, before a grand jury'."); *United States v. DiGilio*, 538 F.2d 972 (3rd 1976) (government charged that that the defendants converted to their own use "records of the United States; that is, *photocopies of official files* of the Federal Bureau of Investigation"); *United States v. Jordan*, 582 F.3d 1239, 1246 (11th Cir. 2009) (indictment under §641 alleged that defendant's "delivered the printouts which as property of the United States had a value in excess of $1000"; in a separate count, indictment alleged that defendant received "a thing of value of the United States, that is, information contained in the NCIC records."). Thus, based on the charging documents, the Government must now prove that PFC Manning stole or converted the actual databases in question.

10. To analogize the charged offense to one involving tangible property,[2] the Government's current charge of stealing or converting a database containing a certain number of records would be akin to charging an accused with stealing a filing cabinet containing a certain number of documents. Here, there is no evidence to suggest that the "filing cabinet" (i.e. database) was stolen or converted. The filing cabinet has remained in the exact same place and used by the government in the exact same manner before and after the alleged theft or conversion. Indeed, the filing cabinet is still available to this day and used in the same manner as it was prior to the alleged theft or conversion. Further, there is no evidence that actual documents contained within the filing cabinet were stolen or converted. To the extent that there is an argument that something was stolen or converted, it is a copy (in this case, a digital copy rather than a photocopy) of the documents contained within the filing cabinet. Stealing or converting a digital copy of a

[2] Section 641 has its origins in tangible property and its substance cannot be relaxed or altered to account for any difficulty that the Government may happen to encounter in using this section to charge the theft or conversion of intangible property.

document within the filing cabinet is not, by any stretch of the imagination, the same thing as stealing the filing cabinet itself. This is readily apparent when one considers valuation. One might have a filing cabinet that costs, say, $1000, but the value of the documents contained in the filing cabinet is only $10.00 (the cost of the paper and ink because the information contained therein in not inherently valuable). The contents of the filing cabinet are not coextensive with the filing cabinet itself either in terms of property or value.

11. To sustain a theft conviction under Section 641, the Government has the burden of proving that PFC Manning wrongfully took "property belonging to the United States government with the intent to deprive the owner of the use and benefit temporarily or permanently." To sustain a conversion conviction under Section 641, the Government has the burden of proving "a misuse [that] seriously and substantially interfere[s] with the United States government's property rights." *See* Appellate Exhibit 410. The Supreme Court held in *Morissette v. United States*, 342 U.S. 246 (1952) that under 18 U.S.C. §641, "[p]robably every stealing is a conversion, but certainly not every knowing conversion is a stealing." Thus, at a minimum, the Government must prove that PFC Manning's took the databases in question in a way that seriously and substantially interfered with the government's property rights in the databases.

12. In *United States v. Collins*, 56 F.3d 1416 (D.C. Cir. 1995) (per curiam), the court explained that "[t]he cornerstone of conversion is the unauthorized exercise of control over property in such a manner that *serious interference* with ownership rights occurs." 56 F.3d at 1420 (emphasis in original). *Collins* involved a Section 641 prosecution of a technical analyst at the Defense Intelligence Agency who used the agency's classified computer system to create and maintain hundreds of documents relating to the analyst's ballroom dance activities. *Id.* at 1418. In the Section 641 prosecution, the Government alleged that the defendant converted, among other things, the agency's computer time and storage space.[3] *Id.* The court held that there was insufficient evidence to support the charge relating to conversion of computer time and storage because the Government did not prove that the defendant's use of the system for non-work related tasks seriously interfered with the Government's property rights in that system:

> [T]he government did not provide a shred of evidence in the case at bar that [defendant] seriously interfered with the government's ownership rights in its computer system. While [defendant] concedes he typed in data and stored information on the computer regarding his personal activities, no evidence exists that such conduct prevented him or others from performing their official duties on the computer. The government did not even attempt to show that [defendant's] use of the computer prevented agency personnel from accessing the computer or storing information. Thus, [defendant's] use of the government computer in no way seriously interfered with the government's ownership rights.

Id. at 1421.

13. Along similar lines, the Eighth Circuit in *United States v. May*, 625 F.2d 186 (1980), reversed the defendant's Section 641 conviction because the district court failed to instruct the jury that conversion under Section 641 required a finding that the defendant's conduct seriously

[3] Notably, the prosecution did not allege that the defendant in that case stole or converted the *computer* itself.

violated the Government's property rights. 625 F.2d at 188. In *May*, the defendant, a former Adjutant General of the Iowa National Guard, "directed a series of unauthorized flights, using National Guard aircraft, fuel and personnel, that served his own convenience rather than that of the National Guard." *Id.* at 188-89. More specifically, the defendant directed 11 unauthorized flights that allowed him to visit his fiancé in various parts of the country. *Id.* at 189. In holding that the district court's failure to instruct the jury on the serious interference element of conversion was reversible error, the *May* Court explained that:

> The touchstone of conversion is the exercise of such control over property that serious interference with the rights of the owner result, making it just that the actor pay the owner the full value of the object.
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> * * *
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> The problem with the district court's instruction is that it assumes that any misuse or unauthorized use of property is a conversion.
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> * * *
>
> [T]he instruction misses the mark because it does not mention the requirement that the misuse constitute a serious violation of the owner's right to control the use of the property.

Id. at 192.

14. Similarly, the Ninth Circuit in *United States v. Kueneman* reversed the defendant's Section 641 conversion conviction because of an inadequate showing that the defendant's conduct seriously interfered with the Government's property rights. No. 94-10566, 1996 WL 473690, at *2 (9th Cir. Aug. 20, 1996) (unpublished). In that case, the defendant was the president of a non-profit organization that participated in a Department of Housing and Urban Development's (HUD) program that leased HUD homes to non-profit organizations for $1/year, provided that the non-profit organizations agreed to sublet these homes to homeless persons. *Id.* at *1. The defendant's alleged conversion occurred when he allowed his daughter to live in one of the HUD homes for six weeks after quarrelling with her husband. *Id.* The Ninth Circuit determined that the Government's evidence of conversion was insufficient as a matter of law. *Id.* The court explained that "not all misuse of government property is conversion. To prove conversion, the government must show [defendant's] misuse of the HUD house was a 'serious interference with the [government's] property rights.' A 'serious interference' is one that prevents the government from making some other use of the property." *Id.* at *1-2 (internal citations omitted). The evidence of conversion was thus held to be insufficient because "[t]he government offered no evidence that it had other contemporaneous uses for the HUD home." *Id.* at *2.

15. Thus, it is clear that the Government must show that PFC Manning's alleged actions resulted in a substantial or serious interference with the Government's use of the databases in question in order for PFC Manning to be found guilty of knowing theft or conversion of databases under Section 641. The Government has failed to offer any such evidence since it is clear that PFC Manning did not steal or convert the databases in question.

16. The Government has not introduced any evidence that the property in question here—the various databases—were ever moved, altered, corrupted, changed or taken away from the United States government. For instance, there is no evidence that WikiLeaks has, or had, the CIDNE database, the Net-Centric Diplomacy database, or the United States Southern Command database in its possession, such that it could make use of those databases. To the extent that WikiLeaks had anything, it is the information that may have been contained within the database at a certain point in time. The databases themselves always remained intact and available exclusively to the United States government.

17. Further, the Government has adduced no evidence to shows that information was actually deleted or removed from the databases, such that the Government was unable to access the databases or parts thereof. The Government has not shown, for instance, that the databases were "down" for a period of time, that PFC Manning's actions rendered the databases inaccessible, or that information was missing from the databases. *See e.g. United States v. Collins*, 56 F.3d 1416 (D.C. Cir. 1995) ("While [defendant] concedes he typed in data and stored information on the computer regarding his personal activities, no evidence exists that such conduct prevented him or others from performing their official duties on the computer. The government did not even attempt to show that [defendant's] use of the computer prevented agency personnel from accessing the computer or storing information. Thus, [defendant's] use of the government computer in no way seriously interfered with the government's ownership rights.").

18. The Government has also not provided any evidence that suggests that PFC Manning's actions interfered in any way with the use and benefit of the databases in question, or that his actions seriously and substantially interfered with the government's use of the databases. The evidence shows that the databases were used in the *exact* same way both before and after PFC Manning's disclosure of the information contained in the databases. The testimony of the unit witnesses indicates that there was no difference in the use of the CIDNE and other databases after WikiLeaks' release of the information. The Government has not introduced evidence that the databases containing the SIGACTS, diplomatic cables or detainee briefs were of less value to the United States government after PFC Manning's actions. The Government has thus not adduced any evidence that PFC Manning stole or converted the databases within the meaning of 18 U.S.C. §641. *See e.g.* Stipulation of Expected Testimony of Mr. Bora ("At no time was the SIGACT information charged in this case unavailable for access on the CIDNE database. Those that accessed the SIGACT database before May of 2010 did so in the same manner after May of 2010. We continue to use the SIGACTs charged in this case in the CIDNE database. To the best of my knowledge, the United States Government has never made these databases publically available.").

19. To once again analogize the offense to the tangible world: the filing cabinets were always in the exclusive possession of the United States government; the filing cabinets were not vandalized or destroyed; the filing cabinets were not altered in any way (much less in a way that impeded the government from using them); all the components of the filing cabinets (e.g. the brackets, the tabs, the file folders) remained intact; all the files in the filing cabinet remained where they were; the filing cabinet itself was not made unavailable for others to use. The analogy to the filing

cabinet helps concretize the idea that PFC Manning in no way, shape, or form, stole or converted the databases in question.

20. The Government obviously has not charged that PFC Manning stole or converted information contained within a database. Nor has it charged that PFC Manning stole or converted copies of digital records kept by the United States government. Instead, it has charged that he stole or converted the databases themselves. Since the Government has introduced no evidence that PFC Manning stole or converted the databases in question, he must be found not guilty of the section 641 offenses.

21. Indeed, even if the Government had charged PFC Manning with theft of *information* contained within the database (rather than theft of the database itself), the Government still has not introduced evidence that PFC Manning stole or converted the information. The Government has not introduced any evidence that it lost possession or the benefit of the information in question. The information contained in the databases in question was always available to analysts and the United States government as needed. In *United States v. Jeter*, 775 F2d 670, (6th Cir. 1985), the accused was charged with stealing carbon paper of a grand jury indictment, along with the information itself. The accused argued that he could not be found guilty under section 641 "because the government did not lose possession of any informational property due to his activities." *Id.* at 680. The Sixth Circuit responded to this argument by noting that the Government charged Jeter with stealing, purloining or converting *or* with selling, conveying and disposing of records and things of value to the United States. The Court noted:

> But the government indicted Jeter under Section 641 not by simply invoking the litany of embezzlement, stealing and/or conversion. The government charged that Jeter did willfully and knowingly embezzle, steal, purloin and convert to his own use and the use of others, *and without authority did sell, convey and dispose of records and things of value of the United States,* the value of which is in excess of $100.00, to wit, carbon paper and the information contained therein relating to matters occurring on October 5, 1983, before a grand jury.
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> This second half of Jeter's Section 641—regarding unauthorized selling, conveying, and disposing of records and/or things of value to the United States government—describes a set of distinguishable activities that are alone sufficient for conviction under Section 641.

Id. at *680-1 (emphasis in original). It is clear that the Sixth Circuit found the evidence sufficient to support a conviction under the "sell/convey/dispose" prong of 18 U.S.C. §641, not under the "steal/purloin/convert" prong of the section. In other words, the accused conveyed records and things of value; he did not steal records and things of value.

22. Similarly, in *United States v. DiGilio*, 538 F.2d 972 (3rd 1976), the defendant argued that the government had not established a violation under section 641 on the basis that "at most, the government lost *exclusive possession* of the information contained within its confidential records, and that Congress never intended section 641, which is essentially a larceny statute, to protect the governmental interest in exclusive possession of its information." *Id.* at 977 (emphasis added). The Third Circuit, like the Sixth Circuit, avoided the issue of whether one

could be guilty of stealing or converting when the information in question was still in the possession of the United States government. Instead, the court noted that duplicate copies were made using U.S. government resources and that those copies were, in themselves, records within the meaning of 18 U.S.C. 641. *Id.* at 978 ("since there was an asportation of records belonging to the United States we need not in this case decide whether appropriation of information alone falls within section 641"). *See also United States v. Morison*, 844 F.2d 1057, 1077.(4th 1988) (distinguishing between theft of original information versus theft of copies: "Those cases involved copying. The defendant's possession in both cases was not disturbed. This case does not involve copying; this case involves the actual theft and deprivation of the government of its own tangible property."). These cases all suggest that an accused cannot be found guilty under the "steal, purloin or convert" portion of section 641 when the government's possession of the property or information in question was not otherwise disturbed.

23. The aforementioned discussion of information, however, is of no consequence given the current charges that PFC Manning stole or converted certain databases (not the information contained therein). Since the Government has not introduced any evidence that PFC Manning stole or converted the databases in question, the Defense requests that this Court enter a finding of not guilty under R.C.M. 917.

B. The Government Is Not Permitted to Amend the Charge Sheet To Now Allege that PFC Manning Stole "Information" or "Copies of Records"

24. To the extent that the Government will now argue that it intended to charge with PFC Manning with knowing theft or conversion of *information* contained within the databases or theft of *copies* of government records (rather than charging PFC Manning with theft or knowing conversion of the databases themselves), the Defense submits that the Government is not permitted to do this, as it is outside the scope of the Charge Sheet. Should this Court consider allowing the Government to do so, the Defense requests an opportunity to further brief this issue and requests oral argument.

25. That the Government intended to charge and prove that PFC Manning stole the *databases* and not information is apparent by looking at the evidence that the Government has introduced on valuation. The Government's witnesses all discussed in detail in their stipulations of expected testimony how much it costs to establish and maintain the relevant *databases* and associated infrastructure in various years. This clearly shows that the Government meant to charge theft of the databases—and not the information—and accordingly should be required to prove the charges in the manner charged. *See also* Appellate Exhibit 58 (in unreasonable multiplication of charges motion, Government emphasizing that "the 18 U.S.C. §641 offenses are aimed at the theft of United States Government-owned *databases*.") (emphasis added).

26. Any change to the charge sheet would be a major amendment which is not permitted over the accused's objection. *See* R.C.M. 603(d) (major changes "may not be made over the objection of the accused unless the charge or specification affected is preferred anew."). Major changes "add a party, offense, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged. R.C.M. 603(b). Only changes where "no substantial right of the accused is prejudiced" are permitted. *Id.* It

seems to be fairly obvious that the words "database", "information" and "copy" mean different things and would have different values for the purposes of the valuation prong of 18 U.S.C. §641. Accordingly, any change as to what PFC Manning would now have to defend against would seriously prejudice his defense.[4]

27. In *United States v. Marshall*, No. 08-0779 (C.A.A.F. 2009), C.A.A.F. held that:

> A variance that is 'material' is one that, for instance, substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." *Finch*, 64 M.J. at 121 (citing *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003)). A variance can prejudice an appellant by (1) putting "him at risk of another prosecution for the same conduct," (2) misleading him "to the extent that he has been unable adequately to prepare for trial," or (3) denying him "the opportunity to defend against the charge.

Id. at 5 (available online at: http://www.armfor.uscourts.gov/newcaaf/opinions/ 2008Sep Term/08-0779.pdf.).

28. In *Marshall*, the accused was charged with escaping from the custody of one, CPT Kreitman. The evidence adduced by the government at trial showed instead that the accused escaped from the custody of SSG Fleming. At the closing of the government's case, the defense moved under R.C.M. 917 for a directed verdict, arguing that there was absolutely no testimony regarding the accused escaping from CPT Kreitman's custody. The military judge denied the motion and convicted the accused by exceptions and substitutions of escaping from the custody of SSG Fleming.

29. C.A.A.F. held that the military judge permitting a variance in these circumstances amounted to error and that the finding of guilty needed to be set aside. C.A.A.F elaborated:

> On the facts in this case, we are convinced the substitution was material. The military judge convicted Appellant by exceptions and substitutions of an offense that was substantially different from that described in the specification upon which he was arraigned. See *Teffeau*, 58 M.J. at 67.
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> Although the nature of the offense remained the same – escape from custody -- by substituting SSG Fleming for CPT Kreitman as the custodian from whom Appellant escaped, the military judge changed the identity of the offense against which the accused had to defend. This denied him the "opportunity to defend against the charge."

[4] To give just one example, had the Defense expected to have to defend against a charge that PFC Manning stole or converted information or stole or converted a copy of records, the Defense would have hired an expert on valuation. Since the Government instead charged PFC Manning with stealing a database, the Defense did not hire an expert because it knew that it could, through the Government's own witnesses, rebut any allegation that PFC Manning stole or converted the databases.

> Having found the variance to be material, we must test for prejudice. Appellant argues that the military judge's findings by exceptions and substitutions "gave the appellant no chance to defend himself against this new charge." The Government argues that there is no prejudice, because regardless of whose custody he escaped from, there was only one event, Appellant knew the nature of the offense, and was able to defend against it. We disagree. Appellant was charged with escaping from CPT Kreitman's custody; the Government presented no evidence that he was in the captain's custody, but attempted to prove that SSG Fleming was acting as CPT Kreitman's agent; the military judge found Appellant guilty by exceptions and substitutions of escaping from SSG Fleming's custody. Had he known that he would be called upon to refute an agency theory or to defend against a charge that he escaped from SSG Fleming, Appellant is unlikely to have focused his defense and his closing argument on the lack of evidence that CPT Kreitman placed him in custody or that he escaped from the custody of CPT Kreitman. "Fundamental due process demands that an accused be afforded the opportunity to defend against a charge before a conviction on the basis of that charge can be sustained." *Teffeau*, 58 M.J. at 67; accord *Dunn v. United States*, 442 U.S. 100, 106-07 (1979). Under these circumstances, we do not believe that Appellant could have anticipated being forced to defend against the charge of which he was ultimately convicted. Accordingly, we find the material variance prejudiced Appellant such that the military judge's finding by exceptions and substitutions cannot stand.

Id. at 7.

30. Similarly, in the instant case, changing the charge from stealing a "database" to stealing "information" or "copies of records" is a fundamental change which alters the very substance and identity of the offense as well as the accused's opportunity to defend against the charge. Just as C.A.A.F. found that escaping from the custody of CPT Kreitman was a different offense than escaping from the custody of SSG Fleming, so too is stealing or converting a "database" a different offense than stealing or converting "information" or "copies of records." The fact that all involve some form of "stealing or converting" is irrelevant and does not support the granting of a variance. In *Marshall*, C.A.A.F. outright rejected the government's argument to a similar effect:

> The Government also argues that it is immaterial from whom Appellant escaped, because the escape was wrongful in any event. The fact that two alternative theories of a case may both involve criminal conduct does not relieve the government of its due process obligations of notice to the accused and proof beyond a reasonable doubt of the offense alleged. *See United States v. Ellsey*, 16 C.M.A. 455, 458-59, 37 C.M.R. 75, 78-79 (1966).

Id. at 9, note 3. *See also United States v. Longmire*, 39 M.J. 536, 540 (A.C.M.R. 1994) (noting that a proposed variance which substituted the violation of an order issued by one commander for the violation of an order issued by another commander "changed the essential character of the original charge" and was therefore not permissible).

31. Similarly, in *United States v. Wilkins*, 1973 WL 14267 (A.C.M.R. 1972), the accused was charged with theft of United States currency of a value of $75.00. At trial, the government introduced proof that the accused stole a wallet, but did not specifically introduce proof of the contents of the wallet, if any. The court stated:

> It appears from the briefs of both the appellant and the government that in the offense of robbery, it is necessary only to establish that something of value was taken and the kind (identity) of property taken is of no import. Thus, we are asked to make the findings conform to the proof irrespective of the pleadings. In so doing, we would find that the appellant did not, as alleged, rob Specialist Belgodere of $75.00 in US currency, but of a wallet of some value. In our opinion such findings would so change the identity of the offense charged as to result in a fatal variance between the findings and the allegations. Accordingly, the Court must conclude that the evidence is insufficient to support the findings of guilty of Specification 2 of Charge II.

Id. at 639. Clearly, as the court held in *Wilkins*, the identity of the *res* that is alleged to have been stolen is critical. One cannot, after the evidence shows that what was stolen was different than what was alleged to have been stolen, change the charge sheet to have the two match up. This is, in the words of the court in *Wilkins*, a "fatal variance" that would "change the identity of the offense charged." *Id.*

32. Accordingly, the Government is not able at this late date to change the Charge Sheet to reflect what it perhaps *should* have charged PFC Manning with. This Court, in other words, cannot make the Charge Sheet fit the evidence. And any request by the Government to do so must be denied. *See Longmire* at 539 ("The fact that the amendment was proffered by the trial counsel after the trial defense counsel had served the defense's motion to dismiss the original specification on him, suggests that the trial counsel believed the motion had merit.").

C. The Government Has Failed to Adduce Any Evidence of the Value of Copies or of Information

33. As argued, the Defense maintains that the Government charged PFC Manning with stealing "databases." It now cannot argue that PFC Manning should be guilty of §641 offenses because its proof shows that PFC Manning stole "information" or "copies of records." However, even if this Court were to consider an amendment to the charge sheet—which the Defense opposes—the Government still has not adduced competent evidence of valuation under §641.[5]

34. As a preliminary matter, the Government absolutely cannot be permitted to "mix and match" its theories and offenses. For instance, the Government cannot introduce evidence of valuation of, say, the creation of a database and then argue that PFC Manning stole or converted copies of

[5] The Defense makes this argument here simply for the sake of rebutting any potential argument that the Government will advance in response to this motion. In reality, this entire discussion of valuation is superfluous since it is clear that the Government has not established that PFC Manning stole or converted the CIDNE, Net-Centric Diplomacy and SOUTHCOM databases.

records or information in the database. Rather, if the Government introduces valuation evidence related to the creation of a database, it must prove that PFC Manning stole or converted the database itself, not information contained within the database or copies of records in the database. Conversely, if the Government argues that PFC Manning stole copies of records or information contained within the database, it must value the copies of records or information within the database. At bottom, the Government cannot be permitted to prove that PFC Manning stole copies of records or information for the purposes of establishing the "steal, purloin or convert" prong of section 641, and then prove the value of the database itself for the purposes of the valuation prong.

35. Again, to use the filing cabinet analogy, the Government cannot be permitted to argue that PFC Manning stole information or copies of records from the filing cabinet, and then rely on the value of the filing cabinet itself to establish the value of the information or copies of the records. As indicated above, one might have a filing cabinet that costs $1000, but that does not mean that the contents of the filing cabinet are worth $1000. They could be worth $1, or they could be worth $10,000. The valuation of a filing cabinet does not speak at all to the valuation of the contents contained therein. *See United States v. Wilkins*, 1973 WL 14267, *639 (ACMR 1972) (evidence of theft of wallet did not establish that the wallet's contents were $75.00 as charged; a variance was not permitted since this would change the "nature of the offense charged").

36. If the Court permits the Government to proceed with a charge that PFC Manning stole information or copies of records (which the Defense submits it cannot for the reasons outlined above) the Government has still not introduced even a shred of evidence as to the value of the information or copies of the records.

37. Courts have been stringent on the proof required to establish valuation for the purposes of 18 U.S.C. §641. In *United States v. Wilson*, 284 F.2d 407 (4th Cir. 1960), the Fourth Circuit stated:

> A fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years cannot be permitted to rest upon conjecture or surmise. In order to sustain the imposition of the higher penalty, it was as incumbent upon the Government to prove a value in excess of $100.00 as it was to prove the identity of the defendant as the perpetrator of the crime, or the ownership of the property.

See also United States v. Thweatt, 140 U.S.App.D.C. 120, 433 F.2d 1226 (1970) ("When there is a possibility of convicting the defendant of either grand or petit larceny offenses which carry significantly different penalties and which are distinguished solely by the value of the property taken it is essential that the government introduce evidence of that value in order to give the jury a firm basis upon which it can render a verdict.").

38. The leading case for this proposition is *United States v. Wilson*, 284 F.2d 407 (4th Cir. 1960). In *Wilson*, the defendant was charged with the theft of 72 rifles at a time when Section 641 only required the property to have value in excess of $100 for a felony conviction. *Id.* at 408. Furthermore, the indictment alleged that the value of the 72 rifles was $7,500. *Id.* at 407. The Government, however, offered no evidence at trial on the value of the rifles, but the jury still

found the defendant guilty on the felony charge. *Id.* at 408. To reach the conclusion that the rifles had value in excess of $100, the jury only needed to infer that each rifle had a value of at least $1.39. *See DiGilio*, 538 F.2d at 980-81 (discussing *Wilson*). The Fourth Circuit vacated the defendant's 7 ½-year sentence because no evidence of the value of the rifles was offered. *Wilson*, 284 F.2d at 408. The *Wilson* Court explained its rationale as follows:

> The Government . . . failed to produce any evidence whatsoever as to the value of the stolen weapons. We are asked to take judicial notice that 72 rifles are worth more than $100.00, but we cannot on the basis of anything in the testimony form a judgment as to value for the purpose of supporting the greater penalty. Nor, in the absence of any proof of value, could the jury be permitted to speculate on this point merely from the appearance of the articles. A fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years cannot be permitted to rest upon conjecture or surmise. In order to sustain the imposition of the higher penalty, it was as incumbent upon the Government to prove a value in excess of $100.00 as it was to prove the identity of the defendant as the perpetrator of the crime, or the ownership of the property.

Id.

39. Similarly, in *United States v. Horning*, 409 F.2d 424 (4th Cir. 1969), the defendant was convicted under Section 641 of stealing several tools from a military base's tool shed. 409 F.2d at 425. The only competent evidence as to the value of the tools offered at trial was the testimony of the pawn broker who lent the defendant $50 for a portion of the stolen tools. *Id.* at 426. The Government emphasized that value of the tools in excess of $100 could be inferred from "the 'common knowledge' that pawnbrokers do not lend the full value of pledged goods." *Id.* The *Horning* Court found this evidence insufficient to sustain the felony sentence imposed and remanded for resentencing. *Id.* at 426-27. The court explained: "[W]e think the inference the Government would draw from the stipulated testimony too speculative to establish in a criminal proceeding the value of the stolen property. Certainly no sufficient foundation was provided to enable the jury to find beyond a reasonable doubt this essential element of the offense charged." *Id.* at 426.

40. Additionally, in *DiGilio*, the Government established that the defendant purchased the stolen FBI files from a codefendant on 25-35 occasions and paid more than $1,000 for the documents in the aggregate. 538 F.2d at 979-80. The Government contended that "because in the aggregate DiGilio paid over $1,000, the jury could infer that at least one of the thefts was of records having a market value of over $100." *Id.* at 980.[6] The *DiGilio* Court disagreed, concluding that:

> [T]here was insufficient evidence from which the jury could infer that any of the several thefts that the [G]overnment proved was of a record having value in

[6] *DiGilio* was decided prior to 2004, when Section 641 was amended to permit aggregation of the value from all of the counts for which the defendant is convicted. *See* Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, § 4, 118 Stat. 831, 833 (2004). Thus, the issue in *DiGilio* was whether there was sufficient evidence to conclude that any one of the 25-35 purchases established value in excess of $100. *See* 538 F.2d at 979-80.

> excess of $100. We do not approve the [trial] court's charge that the jury could determine the cost of gathering and producing the information or the market value in a thieves' market 'on the basis of (its) common knowledge and experience, and the reasonable inferences to be drawn from the evidence.' No reasonable inferences of market value of property involved in any particular theft could be drawn from the evidence. Permitting juror speculation as to value in the absence of evidence was, for the reasons set forth in *United States v. Wilson* and the cases which have followed it, error.

Id. at 981 (quoting trial court).

41. As discussed, to the extent that the Government has introduced evidence of valuation pertaining to the databases in question, such evidence is irrelevant because it is clear from the Government's evidence that PFC Manning did not steal the database (or, to use the tangible analogy, he did not steal the filing cabinet). Even if the Government sought to rely on the theft of copies of records or information, it has not produced any evidence as to the value of the copies or the value of the information.

Valuation of "Copies" of Allegedly Stolen or Converted Records

42. In addition to the market valuation method, Section 641 authorizes "cost price" as a method of proving value. *See* 18 U.S.C. § 641. Under this method, the cost of producing, compiling or using the item allegedly stolen or converted can be introduced to show that the item has value in excess of the statutory amount. In all prosecutions utilizing the cost price valuation method, the relevant cost is the cost of the property actually embezzled, stolen, purloined or converted—in this case, digital copies of records contained within certain databases.

43. In *United States v. DiGilio*, 538 F.2d 972 (3rd Cir. 1976), for instance, the court held that the "a duplicate copy is a record for purposes of the statute, and duplicate copies belonging to the government were stolen." *Id.* at 977. In terms of valuing this duplicate copy, the court held:

> It is not necessary to accept the government's thesis in its entirety to hold that in this case a § 641 violation was established. This case does not involve memorization of information contained in government records, or even copying by thieves by means of their own equipment. Irene Klimansky availed herself of several government resources in copying DiGilio's files, namely, government time, government equipment and government supplies. That she was not specifically authorized to make these copies does not alter their character as records of the government.

Id.

44. Similarly, in *United States v. Zettl*, 889 F.2d 51 (4th Cir. 1989), the defendant was charged with violating Section 641 by conveying Navy documents without authority. 889 F.2d at 52. The Government indicated that it intended to prove that the documents had a value in excess of the statutory amount by showing the "'cost price' of photocopying, transportation, and the other

actual costs of the documents Zettl allegedly conveyed without authority." *Id.* at 54. Like the Government's case in *Fowler*, its case in *Zettl* did not rely on the costs of creating or maintaining the place where the Navy documents were kept. *See also United States v. Hubbard*, 474 F. Supp. 64 (D.C.D.C. 1979) (court allowed prosecution to proceed on theory that "the copies, allegedly made from government documents, by means of government resources, are records of the government , and thus the copies were stolen). Likewise, in prosecuting the former adjutant general in *May*, the government proved value of the property converted – flight time in government aircraft – not by offering evidence as to the value of the entire aircraft, but rather by showing the "cost per hour of operation for each airplane, which included the salaries of the pilots and the mechanics who serviced the planes." 625 F.2d at 191.

45. All these cases illustrate the common sense proposition that if the allegedly stolen or converted property is a copy of a record, then it is the value of the copy that must be established (e.g. the cost of the CD, the time spent copying, the use of government servers etc.). The Government has introduced no evidence of the value of the copies allegedly stolen or converted in this case.

Valuation of "Information" of Allegedly Stolen or Converted Records

46. If the Government instead were to rely on a theory that PFC Manning stole "information" (a charge which is outside the Charge Sheet), it still has not introduced competent evidence of the value of the information allegedly stolen or converted. The most common method used to prove value of stolen or converted property under Section 641 is proof of market value of some kind. In this context, market value has been defined as "the price at which the minds of a willing buyer and a willing seller would meet." *DiGilio*, 538 F.2d at 979. Additionally, as Section 641 punishes the embezzlement, theft, or conversion of government property, the market value of the property can be proven by reference to the "thieves' market" for that property: "[T]he value measure contemplated by [Section] 641 is [not] restricted to an open market price 'between honest, competent and disinterested men'. We apply to the statute what we feel is its obvious, and certainly its practical, meaning, namely, the amount the goods may bring to the thief." *Churder v. United States*, 387 F.2d 825, 833 (8th Cir. 1968) (Blackmun, J.). Several other circuits have also approved of the thieves' market valuation method. *See, e.g., Sargent*, 504 F.3d at 771; *United States v. Oberhardt*, 887 F.2d 790, 792-93 (7th Cir. 1989); *Jeter*, 775 F.2d at 680; *United States v. Gordon*, 638 F.2d 886, 889 (5th Cir. 1981); *DiGilio*, 538 F.2d at 979; *see also Morison*, 604 F.Supp. 655, 664-65 (D. Md. 1985).

47. Mere proof of the existence of a particular market will not be sufficient to establish that the specific property stolen or converted has value in excess of the statutory amount. *See DiGilio*, 538 F.2d at 979. In *DiGilio*, for example, the defendants were charged with stealing copies of information from FBI files. *Id.* at 976. The Third Circuit concluded that there was sufficient evidence of the existence of a thieves' market for the converted documents. *Id.* at 979 ("There was some testimony that these documents were being peddled around town, and that others besides DiGilio had been approached about purchasing them. There would appear to be sufficient evidence to sustain a finding that a thieves' market for the stolen records existed."). Nevertheless, the *DiGilio* Court determined that "evidence showing only the existence of that market is insufficient on the question of value for felony sentences under [Section] 641." *Id.*

The Government in *DiGilio* failed to establish the value of the stolen records on the thieves' market and the court accordingly vacated the felony sentences of the defendants and remanded for misdemeanor sentencing. *Id.* at 981, 989; *see also Sargent*, 504 F.3d at 770-71 (reversing judgment of conviction on the felony Section 641 counts because the government failed to prove value in excess of $1,000, including a failure to show that the property had any "thieves' value" under the market valuation method).

48. Thus, in order to utilize the market value method of valuation, the Government is required to prove the existence of a particular market and that the property allegedly stolen or converted had a value in excess of the statutory amount at the time of the alleged offense. The Government has introduced no credible evidence to this effect.

49. The Government's proffered "expert," Mr. Lewis, candidly admitted that he did not consider himself to be an expert in valuation; had never valued information before; had not even seen the charged documents until last week; had spent only a few hours "researching" in preparation for his testimony; and until last week, did not even understand why he would be testifying. Despite all this, Mr. Lewis offered his opinions on the value of diplomatic cables, SIGACTS, detainee assessments briefs and the Global Address List. He has no particular or specialized knowledge of any of these categories of documents—he is simply familiar with the fact that there is a market for classified information generally.

50. Mr. Lewis' experience with the thieves' market is from the standpoint of a double-agent American seller who is purporting to sell classified information to a buyer on an artificially-created thieves' market.[7] Mr. Lewis admitted that part of the amount of money that a buyer would pay for classified information is for the "relationship" that the buyer is fostering with the seller. He could not apportion how much of that money is for the information and how much is for the relationship itself.

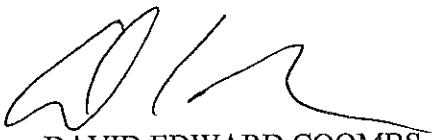
51. Mr. Lewis' "methodology" for valuing information was not reliable, neutral or trustworthy. He essentially testified that he would do a keyword search in the charged documents for certain types of information that had been sold in the past; this would then tell him that the information in question here had similar value. Although he could have, Mr. Lewis did not actually go back to information on prior sales to compare the actual content of the information to ensure its similarity and account for any of a myriad of factors which would alter its value (e.g. open source reporting, the passage of time, etc.). Nor did Mr. Lewis take into account transactions that had not ripened into sales of information. In other words, Mr. Lewis' "valuation" was completely devoid of any context, verification, or any other hallmarks of an expert opinion. Accordingly, the Government has not introduced any evidence which, together with all reasonable inferences could establish that any information in this case had a value of over $1000.

CONCLUSION

[7] The Defense submits that the relevant thieves' market is one where the seller is an actual thief, and not a double-agent masquerading as a thief who is selling, in part, a continuing relationship with a buyer.

52. For the reasons detailed herein, the Defense requests this Court enter a finding of not guilty under R.C.M. 917 for Specification 4, 6, 8, and 12 of Charge II.

Respectfully submitted,



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